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IN THE
Supreme Court of the United States

TINA CONDER,

Petitioner,

v.

RDI/CAESARS RIVERBOAT CASINO, INC.
and M/V GLORY OF ROME,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
INDIANA COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the definition of "vessel" found in 1 U.S.C.A. § 3, as established in *Stewart*, be reaffirmed to apply to all aspects of maritime law in order to promote uniformity of maritime law among the various circuits and states?

2. Should objective standards be required for use in determining whether or not a vessel is permanently moored, i.e., permanently withdrawn from navigation?

3. Is status as a worker covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., required to assert a Sierecki seaman claim for general maritime law damages?

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Judgement Reversed in Part by

RDI/Caesars Riverboat Casino, Inc. v. Conder, 896 N.E.2d 1172, 2008 A.M.C. 2861 (Ind. App. Nov. 25, 2008) (No. 31A04-0802-CV-40)

Appeal after Remand

Conder v. RDI/Caesars Riverboat Casino, Inc., 918 N.E.2d 759, 2010 A.M.C. 763 (Ind. App. Dec 31, 2009) (No. 31A01-0907-CV-348), *transfer denied* (Apr 15, 2010)

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

(i) The judgment sought to be reviewed was entered on December 31, 2009 by the Indiana Court of Appeal.

(ii) No request for rehearing was sought in the Indiana Court of Appeal; a Petition to Transfer to the Indiana Supreme Court was denied on April 15, 2010.

(iii) This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

1 U.S.C. § 3. "Vessel" as including all means of water transportation.

The word "vessel" includes every description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water.

33 U.S.C. § 905. Attached in Appendix.

STATEMENT OF THE CASE

A. Statement of Facts

On or about August 19, 2003, and on numerous subsequent occasions, Tina Conder (hereinafter "Ms. Conder") suffered severe injuries after being repeatedly bitten by fleas during the course of her employment onboard the M/V GLORY OF ROME. Treatment for her adverse reaction to these flea bites included large doses of steroids which caused her to have a heart attack. At the time she was bitten by fleas, Ms. Conder was employed by Caesars as a dealer permanently assigned to the M/V GLORY OF ROME . As such, she was a member of the vessel crew and performed the vessel's work at all pertinent times. On April 26, 2005, Ms. Conder filed a Seaman's Complaint against Appellants/ Defendants RDI/Caesars Riverboat Casino, LLC, and the M/V GLORY OF ROME (hereinafter "Caesars") based on admiralty and general maritime law and the Jones Act, 46 U.S C. § 688.

The M/V GLORY OF ROME is a passenger vessel registered with and regularly inspected by the U.S. Coast Guard. The M/V GLORY OF ROME has its own engines and machinery as well as navigation equipment, lifesaving equipment, and fire fighting equipment. Certificates of Financial Responsibility were issued by the U.S. Coast Guard to show that this vessel has pollution liability coverage.

The M/V GLORY OF ROME was not built to be a work platform. The U.S. Coast Guard's automated information system, the Port State Information Exchange, identifies the M/V GLORY OF ROME as an inspected passenger vessel. The American Bureau of Shipping website identifies the M/V GLORY OF ROME as a passenger casino vessel. The M/V GLORY OF ROME has not applied for permanently moored status.

In order to facilitate operation of the M/V GLORY OF ROME, Caesar's has, at all pertinent times, contracted with Hornblower Marine Services. The website for Hornblower demonstrates that their contract with Caesars includes initiation and management of emergency drills, U.S. Coast Guard inspection/certification, crew hiring, and day-to-day marine operations of the M/V GLORY OF ROME. The M/V GLORY OF ROME is subject to the hazards of navigation and has been struck by a breakaway barge. It still occupies the same mooring site that it used at the time of the barge accident. Should Caesars decide to sail the M/V GLORY OF ROME, it can be ready to sail in a matter of hours.

B. Court Proceedings

On April 26, 2005, Tina Conder filed a Seaman's Complaint against RDI/Caesars Riverboat Casino, LLC, and the M/V GLORY OF ROME based on admiralty and general maritime law and the Jones Act, 46 U.S.C. § 688. In the event she was adjudged not to be a seaman, and, instead, subject to Indiana's workers' compensation laws, Ms. Conder also alleged in the alternative a claim as a seaman pro hac vice, i.e., a Sieracki seaman, doing the work of the vessel. Caesars filed its answer and affirmative defenses on October 27, 2004.

On March 26, 2007, Caesars filed a motion to dismiss. On May 15, 2007, Ms. Conder filed a motion for partial summary judgment seeking to have the court declare her a seaman within the meaning of the Jones Act.

On December 4, 2007, Judge H. Lloyd Whitis ordered that Ms. Conder's Motion for Partial Summary Judgment be granted and that Caesars Motion to Dismiss be denied.

In an Interlocutory appeal, on November 25, 2008,reported at 896 N.E.2d. 1172, a panel of the Indiana Court of Appeals held that the M/V GLORY OF ROME was not a vessel in navigation for Jones Act purposes and that Ms. Conder was not a Jones Act seaman. On April 4, 2009, following defendant's filing of a motion to dismiss, the trial court entered a Dismissal of Ms. Conders Jones Act claims.

On June 1, 2009, the trial court entered an Order dismissing the remaining claims following an additional Motion to Dismiss filed by defendants. The Court of Appeals, in a decision issued on December 31, 2009 and reported at 918 N.E.2d. 759, declined to reconsider its prior decision and furthermore held that Ms. Conder was not a longshoreman nor engaged in maritime employment and therefore not eligible for a Sieracki seaman general maritime claim.

From this decision petitioner attempted a Petition to Transfer the matter to the Indiana Supreme Court which petition was denied on April 15, 2010 and from which decision this writ arises.

REASONS FOR GRANTING THE PETITION

1. **Should the definition of a vessel found in 1 U.S.C. § 3, as established in *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005), apply to all aspects of maritime law in order to promote uniformity of maritime law among the various circuits and states?**

A review of the jurisprudence pertaining to vessels "in navigation" reveals a smorgasbord of theories resulting in decisions which can be described as confusing at best. Not only are there conflicting opinions between the circuits but within the very circuits themselves. It is conceivable that such divergent holdings could leave an injured party without any remedy whatsoever.

The bulk of the conflicting decisions pertain to employees aboard riverboat casinos. The ultimate conflict has been narrowed to whether or not the vessel in each case is a vessel "in navigation." In determining whether or not a claimant is a seaman on a vessel in navigation at the time of his or her injury, the results have been inconsistent to say the least. Under 7th Circuit jurisprudence, a claimant can be deemed a seaman for purposes of the FLSA (*See Harkins v. Riverboat Services, Inc.*, 385 F.3d 1099 (7th Cir. 2004) and yet the same claimant, if injured on the vessel, will be deemed not a seaman for purposes of the Jones Act. (*See Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004). However, riverboat casino workers have been found to be seamen for purposes of the Jones Act, and as such, they were covered by compensation statute enacted by Congress and not covered by state Workers' Compensation Act for injuries sustained while employed on riverboats. *Harvey's Casino v. Isenhour*, 724 N.W.2d 705 (Iowa,2006).

The 7th Circuit has suggested that where riverboat casino employees are concerned, there is a distinction between the vessel's maritime crew and the casino workers. *Harkins v. Riverboat Services, Inc.*, 385 F.3d 1099, 1103 (7th Cir. 2004). Other courts have declined to make such a distinction in finding that dealers and other gaming-related employees on casino boats (Conders's job) were Jones Act seamen. *See Frederick v. Harvey's Iowa Management Co., Inc.*, 177 F. Supp. 2d 933 (S.D. Iowa 2001), *Long v. Diamond Jo Casino*, 2000 WL 876908 (N.D. Ill), 2000 A.M.C. 2456. *See also Knight v. Grand Victoria Casino*, (Not reported in F. Supp. 2d) 2000 WL1434151 (N.D. Ill.) (reasonable trier of fact could

conclude that dealer's connection to vessel was substantial enough to put her under the Jones Act's protective umbrella); *Harvey's Casino v. Isenhour*, 724 N.W.2d 705 (Iowa, 2006) (Riverboat casinos' slot-machine attendant, banker, and floor host were "seamen" for purposes of federal Jones Act).

Riverboat casino employees were almost universally accepted as seamen and entitled to the benefits of the Jones Act until several states rescinded previous legislation requiring casino boats to regularly cruise upon navigable bodies of water. The state legislatures decided that these vessels would no longer be required to sail and could conduct their gambling activities dockside.

The resulting litigation, subsequent to the relaxation of the sailing requirement, has now evolved to a point where, in effect, the state legislatures have usurped well-established federal maritime law.

Some courts have held that since the vessels are no longer required to sail they are no longer vessels in navigation. *See for example, Hertz v. Treasure Chest Casino, L.L.C.*, 274 F. Supp. 2d 795 (E.D. La. 2003); *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006); *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004); *RDI/Caesars Riverboat Casino, Inc. v. Conder*, 896 N.E.2d 1172 (Ind. App. 2008).

Other courts have held that said boats continue to be vessels in navigation. *See for example Board of Com'rs of Orleans Levee Dist. v. M/V BELLE OF*

ORLEANS, 535 F.3d 1299 (11th Cir. 2008) (involving maritime liens for wharfage fees); *Booten v. Argosy Gaming Co.*, 364 Ill. App. 3d 697, 848 N.E.2d 141 (Ill. App. 5 Dist. 2006). *Luckhart v. Southern Ill. Riverboat/ Casino Cruises Inc.*, 2010 WL 2137451 (S.D. Ill. 2010).

As previously stated some courts in the same circuit have found these boats to be in navigation in one instance and not to be in navigation in other instances. Also as previously stated, they have found these floating casino employees to be Jones Act seamen when making a claim under one statute while not considered seamen when making a claim under a different statute such as the FSLA, resulting in what best can be described as chaos.

At the outset it should be noted that the state legislatures themselves merely stated that these vessels are no longer required to sail but make no mention whatever as to the seaman status of the casino employees or as to vessel status.

Perhaps the most definitive case addressing this virtual buffet of jurisprudence is *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005).

This Honorable Court in *Stewart* attempted to establish some unanimity when deciding these type of cases but confusion and conflict reign nevertheless.

Stewart basically established the definition of a "seaman" under the LHWCA or under the Jones Act as being defined as follows at page 487:

> First, "seaman" is a term of art that had an established meaning under general maritime law. We have thus presumed that when the Jones Act made available negligence remedies to [a]ny seaman who shall suffer personal injury in the course of his employment," Congress took the term "seaman" as the general maritime law found it. *488
>
> Second, Congress provided further guidance in 1927 when it enacted the LHWCA, which provides scheduled compensation to land-based maritime workers but which also excepts from its coverage "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). This exception is simply "a refinement of the term 'seaman' in the Jones Act." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991). Thus, the Jones Act and the LHWCA are complementary regimes that work in tandem: The Jones Act provides tort remedies to sea-based maritime employees. *Ibid., Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 6-7, 66 S.Ct. 869, 90 L. Ed. 1045 (1946).
>
> Still, discerning the contours of "seaman" status, even with the general maritime law and the LHWCA's language as aids to interpretation, has not been easy.

> *See Chandris, supra*, at 356, 115 S.Ct. 2172. We began clarifying the definition of "seaman" in a pair of cases, ** *McDermott Int'l, Inc. v. Wilander, supra*, and *Chandris, supra*, that addressed the relationship a worker must have to a vessel in order to be a "master or member" of its crew.

As a casino boat employee (table games dealer), Ms. Conder clearly meets the requirement that the worker contribute to the "function" of the vessel or the accomplishment of its mission. Because the "function" and/or "mission"of a riverboat casino is to provide entertainment and games of skill and chance, casino employees necessarily contribute to that function. Prior to and subsequent to the *Stewart* case a member of a crew has been defined as any employee who contributes to or furthers the mission of the vessel. It has long been established that casino employees aboard riverboats function in that capacity. *See for example, Bailey v. Aztar Indiana Gaming Corp.*, 2005 WL 4880620, *2 (S.D. Ind.) (river boat's mission was gambling), *Lara v. Harvey's Iowa Management Co., Inc.*, 109 F. Supp. 2d 1031, 1036 (S.D. Iowa 2000) (bartender's work directly supported riverboat's money-making and entertainment function), *Harvey's Casino v. Isenhour*, 724 N.W. 2d 705, 709 (Iowa App. 2006) ("the mission of the riverboats was to provide gambling for its patrons and that these claimants contributed to that function.").

The *Stewart* court also defined a "vessel" as follows at page 489:

> "In determining the meaning of the revised statutes, or any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, . . . [t]he word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 18 Stat., pt. 1, p. 1.
>
> Sections 1 and 3 show that, because the LHWCA is an Act of Congress passed after February 25, 1871, the LHWCA's use of the term "vessel" "includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Ibid.*

The M/V GLORY OF ROME meets the classic definition of a vessel as it is a water-craft capable of being used as a means of transportation on water. The M/V GLORY OF ROME was built with one single purpose in mind, to transport passengers and gaming equipment on the Ohio River. The Coast Guard's automated information system identifies the M/V GLORY OF ROME as an inspected passenger vessel. (*See* <http://cgmix.uscg.mil/PSIX>). The American Bureau of Shipping identifies the M/V GLORY OF ROME as a passenger casino vessel. (*See* <http://absapps.eagle.org>). The M/V GLORY OF ROME has a fully functioning wheelhouse, functioning engines rendering it fully capable of self-propulsion, life-saving equipment,

navigation aids, and a crew. It can not be seriously denied that the M/V GLORY OF ROME is a vessel under long established federal maritime law.

We now arrive at the contentious issue of whether or not a vessel is "in navigation", particularly as it applies to riverboat casino vessels. The single issue that has led us down this calamitous path is the action of the various state legislatures that rescinded prior statutes mandating that these casino boats be required to sail. That is all that the state legislatures legislated. However, these simple legislative acts have devolved into a morass of conflicting and confusing jurisprudence.

As previously stated some courts have held that the determination of whether or not a gambling boat is in navigation depends upon the intent of the shipowner and whether or not the vessel is indefinitely or permanently moored. Other courts have held that these vessels are not in navigation only when they have been permanently moored.

Further confusion has resulted when the courts have attempted to make a distinction between indefinitely and permanently moored. Some courts have held that a vessel is permanently moored when it is only theoretically capable of sailing but not permanently moored when it is practically able to sail.

Additional confusion arose when other courts have totally ignored the accepted meaning of the words permanent and indefinite and have allowed the shipowners by the mere use of an affidavit to convert an indefinitely moored vessel to the status of a

permanently moored vessel, thereby creating a favored class of litigants.

As previously stated the primary issue in this matter was whether or not the GLORY OF ROME was in navigation at the time of Ms. Conder's injury. A review of the Stewart decision as rendered by this Honorable Court would lead to no other conclusion than that it was.

Petitioner argues that the GLORY OF ROME qualifies as a "vessel" in that it is a watercraft used, or capable of being used, as a means of transportation on water as required by *Stewart*. The *Stewart* decision specifically states that a watercraft is not required to be used primarily for that purpose, although that was the primary purpose of the GLORY OF ROME prior to the "no sailing" statute passed by the State of Indiana.

In discussing whether or not a watercraft is capable of being used for maritime transport in any meaningful sense the *Stewart* court stated the following at page 493 B:

> [2] Cope and Evansville did no more than construe § 3 in light of the distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore or resting on the ocean floor. *See, e.g., The Alabama*, 19 F. at 546 (noting that vessels possess "mobility and [the] capacity to navigate," as distinct from fixed structures like wharves, drydocks, and bridges). Simply put, a watercraft is not

"capable of being used" for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.

This distinction is sensible: A ship and its crew do not move in and out of Jones Act coverage depending on whether the ship is at anchor, docked for loading or unloading, or berthed for minor repairs, in the same way that ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again. *See Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (C.A. 5 1995) (floating casino was no longer a vessel where it "was moored to the shore in a semi-permanent or indefinite manner"); *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660 (C.A. 9 1992) (floating processing plant was no longer a vessel where a "large opening [had been] cut into her hull," rendering her incapable of moving over the water). Even if the general maritime law had not informed the meaning of § 3, its definition would not sweep within its reach an array of fixed structures not commonly thought of as capable of being used for water transport. *See, e.g., Leocal v. Ashcroft, ante*, 543 U.S. at 9, 125 S.Ct. 377, 382, 60 L.Ed.2d 271 ("When interpreting a statute, we must give words their 'ordinary or natural' meaning" (*quoting Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993)).

It is clear that a watercraft is capable of being used for maritime transport or in navigation unless it has been permanently moored or otherwise rendered practically incapable of transportation or movement. The GLORY OF ROME was not so encumbered. It was neither permanently moored nor rendered practically incapable of transportation or movement.

In fact, as evidenced by Ms. Conder's affidavit filed in her opposition to the motion for summary judgment the GLORY OF ROME did, in fact, sail on several occasions subsequent to the implementation of the "no sailing" legislation. Not that any such sailing would be necessary, under *Stewart*, as long as the watercraft is capable of being used as transport upon navigable waters.

The *Stewart* court used the *Kathriner* case as an example of a permanently moored vessel, but a large opening had been cut into the hull of the KATHRINER which obviously rendered it incapable of being used for water transport. Not so in the instant matter.

Pavone is also distinguishable in that the involved floating structure, the BILOXI BELLE, had not been built as nor been used as a seagoing vessel to transport passengers, cargo, or equipment across navigable waters. The BILOXI BELLE employed no navigational or nautical crew. It had no engine, no captain, no navigational aids, no crew quarters, and no lifesaving equipment. It was outfitted with a decorative pilot house containing no operating parts other than a single light switch. The faux pilothouse contained no steering mechanism and was decorated with an antique wheel

purely for aesthetic purposes. Decorative ring buoys on the Biloxi Belle were purely for visual effect and were not intended for lifesaving use. There was a motorized, but nonfunctional, paddlewheel affixed to the Biloxi Belle. The wheel rested permanently above the water level and served no propulsion function. *See Pavone v. Mississippi Riverboat Amusement, Ltd.*, 52 F.3d 560, 564 (5th Cir. 1995).

From its very inception the BILOXI BELLE was meant to be permanently and, in fact was, moored to shore by steel lines affixed to sunken steel pylons that were filled with concrete. The first level of the BILOXI BELLE was connected to the pier by steel ramps, and the second level was joined to a shore-side building. In addition, numerous shore-side utility lines-telephone, electric, gas, sewer, domestic fire and water, cable TV, and computer-were connected permanently (or at least indefinitely) to the BILOXI BELLE. *See Pavone v. Mississippi Riverboat Amusement, Ltd.*, 52 F.3d 560, 564 (5th Cir. 1995). Obviously it was never required to sail nor was there any intent other than to permanently anchor the structure as a permanent casino sitting on a navigable body of water only because it was required to be so situated. It never possessed the qualities of a floating vessel, never acquired Coast Guard certification, never had a maritime crew and certainly never had the intent of transporting patrons.

For all practical purposes, indefinitely moored in the *Pavone* case is identical to permanently moored insofar as the indefinite mooring of the *Pavone* vessel rendered it practically not capable of ever sailing. The indefinite mooring in the *Pavone* case is proven by objective facts,

that is, i.e., the lack of navigational equipment and crew and the permanency of the mooring process.

Such is not the case as it pertains to the GLORY OF ROME as the so-called indefinite mooring was not proven by objective facts as in the *Pavone* case but merely by a self-serving declaration in the form of an affidavit filed by a biased party to the litigation. By allowing a vessel to be considered indefinitely moored by a subjective affidavit the courts are allowing fully navigational vessels to sail in and out of Jones Act coverage, a practice which this court does not condone.

The courts that have accepted this practice are allowing fictionalized mooring and have relegated fully operational navigable vessels to the status of a fictionalized non-vessel. By doing so the casino owners have been allowed to bypass the procedures regularly required to decommission a vessel and instead by use of an affidavit (usually prepared after the event giving rise to the litigation) fictionally decommission the casino vessels.

The no sailing legislation enacted by state legislatures resulting in the fictionalized inactive status of a fully manned vessel should not determine vessel status, but rather, the body of federal maritime law, as shaped by the federal courts that has evolved over the years.

The GLORY OF ROME was initially designed and built to be a cruising, gaming casino, transporting persons across navigable waters, possessing all of the attributes of a vessel in navigation and did, in fact,

perform the functions of a cruising vessel for many years. At the time of Ms. Conder's injury, the GLORY OF ROME was fully staffed and crewed, was in a constant state of maintenance and readiness and was ready to cruise by simply casting away the mooring lines and cables which temporarily confined it to the dock.

The restraint on cruising is a paper restraint, a state statute, which does nothing to physically restrain the vessel from navigating the waters of the Ohio River, nor to relieve the vessel of its obligation to furnish a ship-shape seaworthy vessel with a qualified crew in order to pass Coast Guard inspections and to maintain Coast Guard certification. Furthermore, it does nothing to eliminate the perils of the sea that its employees face daily.

While docked, the M/V GLORY OF ROME remains afloat in navigable waters and still faces certain unique maritime perils including taking on water and possibly sinking; people falling overboard; the continuous peril of fires and it is also subject to the wake created by other watercraft traversing the Ohio River not to mention its exposure to being struck by other watercraft.

It only takes one collision to expose passengers or crew aboard the GLORY OF ROME to injuries resulting from the collision itself and/or possibly from their falling overboard and possibly drowning or sustaining serious injury.

In sum, the GLORY OF ROME completely possesses all of the attributes required, both theoretically and factually of a riverboat gambling vessel capable of plying navigable waters.

The GLORY OF ROME, in addition to its gambling function, also provides entertainment and serves alcoholic beverages aboard the vessel.

It is certainly reasonable to expect that a patron will imbibe too much alcohol, became unsteady on his feet and risk the possibility of falling overboard into the Ohio River, a navigable body of water. Even though the vessel has not moved from its moored position, the passengers face the same perils they would have faced had all taken place in the same water while not in a moored state.

In effect, while the GLORY OF ROME is moored, it may not be navigating but it is in navigation.

The divergent holdings by the various circuit courts of appeal have effectively reduced the distinction between vessels that are theoretically capable of navigating, practically capable of sailing, remotely capable of sailing, permanently docked and indefinitely docked. Depending upon which court is speaking, each one of those terms have different meanings and some are used interchangeably. There is no uniformity and even the same courts have applied different meanings to the same terms.

2. **Should objective standards be required for use in determining whether or not a vessel is permanently moored, i.e., permanently withdrawn from navigation?**

Indeed, the jurisprudence has devolved to such a point where a preferred class of litigants have now been established who can now determine the fate of thousands of casino employees by merely filing a self-serving affidavit supposedly proving "intent" without having to provide any objective evidence whatsoever in support of their self-serving declarations.

This lack of jurisprudential unanimity leaves claimants helpless and the determination of their fate left entirely within the whims of shipowners who can deny legitimate remedies to a whole class of litigants by merely filing a self-serving declaration which benefits their self interest.

Some courts have totally ignored the accepted meaning of the words permanent and indefinite and have allowed the shipowners by the mere use of an affidavit to convert an indefinitely moored vessel to the status of a permanently moored vessel. *See Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004). It is then entirely conceivable that a shipowner will file an affidavit today stating his vessel is indefinitely or permanently moored and if it sails the next week for whatever reason will claim that his intent at the time he made the affidavit was to keep his vessel indefinitely or permanently moored at that time.

While Caesars may claim that the M/V GLORY OF ROME is indefinitely moored and there are no intentions for her to sail again, Caesars intentions may also change in ways that are unanticipated at this time. Influenced by a change in public sentiment, Indiana law could change and once again require cruising. Should a more populated county in Indiana allow gaming or should Kentucky enact gaming laws, there is nothing preventing Caesars from simply unmooring the M/V GLORY OF ROME and sailing off to a more lucrative market. Caesars stated in open court that it could not definitively state how long in the foreseeable future the M/V GLORY OF ROME would remained moored and that the vessel could move to Kentucky should that state allow gaming in the future.

The owner's intentions with regard to a boat are analogous to the boat's "purpose," and *Stewart* clearly rejected any definition of "vessel" that relies on such a purpose. Such a test is incompatible with the Supreme Court's focus on providing uniformity within admiralty jurisdiction. *See Board of Com'rs of Orleans Levee Dist, supra*, *9.

As pointed out by the Eleventh Circuit in *Board of Com'rs of Orleans Levee Dist., supra*, *10, an owner's intentions may change in ways never anticipated. The Eleventh Circuit looked to the *Star of India, Luna v. Star of India*, 356 F.Supp. 59, 66 (S.D. Cal. 1973) for an example. In 1973, the Southern District of California rejected the U.S. Coast Guard's designation of the M/V STAR OF INDIA as permanently moored and her owner's statement that he did not intend to sail her again, and, instead, declared her subject to admiralty

jurisdiction. A mere three years later, the M/V STAR OF INDIA was put to sea for the first time in fifty years, and she continues to sail annually.

Mental reservations have no place in the law when it adversely affects the rights of hundreds of claimants. Self serving affidavits made by parties furthering their self interests are hardly reliable.

Objective criteria rather than the vessel owner's subjective intent have been and should be used to determine whether a riverboat casino is permanently moored. The appellate courts of several states have identified key factors that influenced their determination that the ability of a moored casino boat to cruise remained a practical possibility rather than a merely theoretical possibility: (1) the boat was in compliance with all Coast Guard regulations pertaining to a passenger vessel and was inspected by the Coast Guard, (2) the boat maintained a full maritime crew and was equipped with a motor, fuel, and everything necessary for navigation, (3) the boat could be disconnected from its mooring cables and cruising within a relatively brief time period, (4) the boat actually navigated, and (5) the boat had not applied for permanently moored status. *See Booten v. Argosy Gaming Co.*, 848 N.E. 2d 141, 145-146 (Ill. App. 5 Dist. 2006), *Harveys Casino v. Isenhour*, 713 N.W.2d 247, 2006 WL 228921, *3-4 (Iowa App.), *Davis v. Missouri Gaming Co.*, 51 S.W. 3d 168, 174-75, 177 (Missouri Ct. App. W.D. 2001).

In *Booten v. Argosy Gaming Co.*, 848 N.E.2d 141 (Ill. App. 5th District 2006), the Court of Appeals ruled that a casino boat that "actually navigates the Mississippi River approximately five times per year when it is released from its mooring and spun around to remove accumulated drift materials" was a vessel in navigation for purpose of the Jones Act. *Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 145-46 (Ill. App. 5th District 2006). The vessel in question left its mooring for de-drifting approximately five times per year. During this process the boat was spun two or three times to dislodge any accumulated drift materials. The boat then returned to its mooring. Despite no longer cruising, the vessel always had fuel on board and remained fully capable of navigating the river. Defendant had never applied for permanent mooring status. The boat was required to comply with all Coast Guard regulations for a passenger vessel. The boat was inspected every 90 days by the Coast Guard to ensure compliance with regulations. When customers are on board, a full marine crew must also be on board. The boat employed a senior captain, 3 captains, 4 engineers, 4 mates, and 21 deck hands and remained a licensed passenger vessel. *See Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 142-43 (Ill. App. 5th District 2006).

In reaching its decision, the *Booten* court examined *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004) and noted that the district court determined the casino was, in fact, permanently moored based upon statements made by defendant's agent that it intended to permanently moor the casino. *See Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 144, (Ill. App. 5th Dist. 2006). The *Booten*

court pointed out that in accepting the trial court's findings that the vessel in question was permanently moored and thus concluding that the vessel was no longer in navigation, the *Howard* court discounted the weight of actions by the defendant which were contrary to that determination. *See Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 1444, (Ill. App. 5th Dist. 2006). The Seventh Circuit merely relied on the self-serving statement by the defendant's agent that it did not intend to cruise the vessel. *See Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 144 (Ill. App. 5th Dist. 2006).

The *Booten* court noted that the defendant never relinquished its certificate of inspection from the Coast Guard, nor did it apply for permanent mooring status. *See Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 144 (Ill. App. 5th Dist. 2006). The key factual scenario noted by the Booten court is also present in the matter now before this court. Caesars has offered no proof that the M/V GLORY OF ROME is permanently moored other than a self-serving statement that it does not intend to cruise. The M/V GLORY OF ROME continues to be inspected by the Coast Guard, is fully crewed, always has fuel on board, remains fully capable of navigating the river, and has not been granted permanently moored status.

Therefore, there are established guidelines which should be followed to convert a vessel from the status of "in navigation" to one "not in navigation". A definition that is not unequivocal, based on objective actions and that does not rely on the whim of a biased litigant should determine status and not the mere use of a subjective self-serving affidavit.

If a casino owner/shipowner truly intends to permanently berth its vessel, it should be required to unequivocally do so and not be allowed to affect the lives of so many litigants by the mere use of a self-serving declaration furthering the affiant's self-interest.

State legislatures were never meant to have the authority to supercede federal maritime law especially when jurisprudence evolves to a point where those with the most to gain can deprive injured claimants the benefits derived from seaman status by the mere use of self-serving declarations. This could not possibly be the desired outcome of the use of the state legislative process. By allowing this to happen, courts have now allowed the tail to wag the dog.

Petitioner suggests that a casino boat permanently removed from navigation is similar to that class of vessels known as "Dead Ships. " Dead ships or dead vessels represent a subcategory of non-vessels as they are indisputably vessels for most of their useful life, but thereafter they assume the status of non-vessels. *See Colonna's Shipyard, Inc. v. U.S.A.F. GENERAL HOYT S. VANDENBERG*, 584 F. Supp. 2d 862, 867 (E.D. Va. 2008). A key element in determiñing whether a watercraft that was indisputably a vessel at some point in the past is now a "dead ship is whether such watercraft is permanently withdrawn from navigation. *See Colonna's Shipyard, Inc. v. U.S.A.F. GENERAL HOYT S. VANDENBERG*, 584 F. Supp. 2d 862, 867 (E.D. Va. 2008).

Vessel owners can take actions which can be used as objective facts in establishing that a vessel is merely

"theoretically capable" of maritime transportation. For example see the following Federal court decisions and their handling of similar issues:

1. *McAdow v. Promus Companies, Inc.*, 926 F.Supp. 93, 95 (W.D. Louisiana 1996) (concrete barriers separated casino boat from the Red River, requiring a crane barge to lift the gate of the coffer cell before the vessel could be freed from its retaining walls.).

2. *Dunklin v. Louisiana Riverboat Gaming Partnership*, 2001 WL 650209, *2 (5th Cir. La.) (casino vessel sitting in an enclosed pond in a cofferdam was deemed clearly withdrawn from navigation because of the "massive amounts of time and money" required to allow the vessel to leave the cofferdam.).

3. *Silver Slipper Casino Venture LLC v. Does*, 264 Fed. Appx. 363, 364-65 (5th Cir. 2008) (casino boat was moored in a marina that was almost completely surrounded by land mass with the exception of an opening providing ingress and egress to yachts moored in the marina. The vessel was not exposed to the perils of the sea or the hazards of navigation.).

4. *In re Complaint of American Milling Co.*, Unlimited 2008 WL 2727257, *6 (E.D.Mo.) (casino boat was stripped of engines to power motion and steering, possessed no life jackets or marine equipment to communicate with the Coast Guard, and its entire physical construction had been modified).

5. *Wire v. Showboat Marina Casino*, 2008 WL 818310, *5,6 (N.D. Ill. 2008)(vessel had been modified and could not sail in its modified condition.).

Further, the Coast Guard Marine Safety Manual outlines specific criteria that must be met before a vessel is considered to have been taken out of transportation and permanently moored. Most importantly, the vessel must be immobilized so that it cannot be moved except on a deliberate basis where extensive effort and equipment would be required. Therefore, Petitioner avers that owners of casino boats can take steps to demonstrate permanently moored status such as enclosing the vessel in a cofferdam or artificial channel; removing or disabling the vessel's engines; physically modifying the vessel's structure; and releasing the vessel's captain and marine crew.

Petitioner suggests that owner's of "indefinitely moored" or "semi-permanently moored" casino boats are strictly concerned with profits and do not wish to expend the funds necessary to permanently remove the vessel from navigation. Casino owners are also aware that public sentiment could change in the future. With the exception of Mississippi, all states that allowed casino boat gaming initially required that the vessel sail regularly. One-by-one, the legislatures changed the laws to allow "dockside" gaming. A change in public sentiment could once again result in a requirement that the casino boats actually sail. In sum, many owners of casino vessels cannot or will not take the steps necessary to permanently moor their vessels, and yet, they want protection from liability in Jones Act or General

Maritime law matters when their employees are injured in service of their vessels.

Petitioner avers, as has been pointed out by many courts in this land, that vessel status turns not on the intent of the owner, but rather, on objective facts establishing that the ship is "practically capable" of maritime transportation. As noted by the court in *Sea Village Marina*, "It would seem a rather odd definition of 'capable' that would allow it to apply or not apply depending on mere plans and expectations, which are always subject to change." *Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat*, Hull ID No. LMG37164M80d, 2009 WL 3379923, *8 (D.N.J.), 2010 A.M.C. 404.

As explained by the Eleventh Circuit in *Belle of Orleans*, vessel status cannot turn on a shipowner's subjective intentions as such a test is "incompatible with the Supreme Court's focus on providing uniformity within admiralty jurisdiction." *Board of Com'rs of Orleans Levee Dist. v. M/V BELLE OF ORLEANS*, 535 F.3d 1299, 1311 (11th Cir. 2008). *See also Colonna's Shipyard, Inc. v. U.S.A.F. GENERAL HOYT S. VANDENBERG*, 584 F. Supp. 2d 862, 871 (E.D. Va. 2008) ("A standard devoid of the need to ascertain intent is more likely to lead to predictable and settled commercial expectations because it relies on objective criteria."); *Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat*, Hull ID No. LMG37164M80d, 2009 WL 3379923, *8 (D.N.J.), 2010 A.M.C. 404 (Holding the intent of the owners irrelevant and focusing on objective characteristics is useful for the purpose of uniformity).

The question is ultimately whether the beliefs and expectations of the parties can alter the "practical possibility" of the craft's "use as a means of transportation on water." *Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat*, Hull ID No. LMG37164M80d, 2009 WL 3379923, *8 (D.N.J.), 2010 A.M.C. 404 *citing Stewart*, 543 U.S. at 496.

Post accident affidavits which assert subjective "intentions" have no place in the law when it adversely affects the rights of hundreds, if not thousands, of claimants. Self serving affidavits made by parties furthering their self interests are hardly reliable. An owner's intentions may change in ways never anticipated. *Board of Com'rs of Orleans Levee Dist. v. M/V BELLE OF ORLEANS*, 535 F.3d 1299, 1312 (11th Cir. 2008).

If a casino owner/shipowner truly intends to permanently berth its vessel it should be required to unequivocally do so and not be allowed to affect the lives of so many litigants by the mere use of a self-serving declaration furthering the affiant's self-interest. By allowing a vessel to be considered indefinitely moored by a subjective affidavit, the courts are allowing fully navigational vessels to sail in and out of Jones Act coverage and are making maritime law malleable or even changing it and making it not uniform, practices which this Court has repeatedly stated it will not condone.

The issue of owner intent has also been addressed in recent law review articles. For example, see the following:

1. David W. Robertson, *How the Supreme Court's New Definition of "Vessel" is Affecting Seaman Status, Admiralty Jurisdiction, and Other Areas of Maritime Law*, 39 J. Mar. L. & Com. 115, 133, 134 (2008): At one end of the spectrum are cases in which the only argument against vessel status is the casino boat operator's announced intention to sail no more. A number of the pre-Stewart cases using the "in navigation" requirement to deny seaman status to workers on casino boats fell into this category. The big post-Stewart question is whether a casino boat operator's completely believable intention to remain at the dock as long as the gambling is good can justify characterizing the boat as "permanently moored or otherwise rendered practically incapable of transportation or movement." On its face, such a characterization seems strained: The boat's capability for marine transportation remains as practical as it was the day before the legislature changed the law.

2. Stephen W. Grant, Jr., *Calling All Bets On Gaming Boat Vessel Status: An Analysis Of How The Fifth Circuit Is Consistent With Stewart v. Dutra Construction Co.*, 34 Tul. Mar. L.J. 331, 352 (2009): Owner intent does not have to be a purely subjective factor because the surrounding facts and circumstances will often clearly indicate the intent of the owners. An

owner who alleges no maritime transportation function would hardly seem credible if the boat had recently cruised or if the crew rigorously maintains operable engines and navigational aids.

3. Ross I. Landau, *A Theoretical Possibility Of Navigation: An Analysis Of The Vessel Status Of Watercraft-Casinos In The Wake Of Stewart V. Dutra Construction Co.*, 32 Tul. Mar. L.J. 249, 274 (2007): The objective manifestations of an owner's intent, particularly whether the watercraft in question remained registered with the Coast Guard as a passenger vessel or had been reclassified as a "permanently moored vessel," can serve as reliable indicia of the owner's intent. In addition, maintenance of a working engine, steering controls, and navigational equipment, as well as the employment of a trained captain and crew, objectively evince an intent to use, or at least to be prepared to use, a watercraft in maritime transportation.

Petitioner avers that there is a need for this Court to specifically address the issue of whether or not casino boats that once sailed regularly but no longer do so pursuant to changes in state gaming laws are vessels in navigation for purposes of the Jones Act and general maritime law.

The *Stewart* court seemingly indicated that a vessel "permanently" taken out of the water is not a vessel in navigation, but then immediately cited *Pavone*, a case

where a floating casino, which had never been intended to be used as a vessel, was not a vessel because it had been "semi-permanently" or "indefinitely" removed from navigation. Petitioner asserts that clarification of the citation to *Pavone* is necessary to reduce the confusion found in Federal Circuit and state courts. Petitioner respectfully asks this Court to clearly state that a determination of whether a casino boat is either practically or theoretically capable of sailing should be made solely on the basis of whether or not the vessel has been permanently removed from navigation.

Petitioner suggests that the subcategory of non-vessels known as "dead ships" be expanded to include casino boats permanently removed from navigation. Dead ships or dead vessels are indisputably vessels for most of their useful life, but thereafter they assume the status of non-vessels when they are permanently withdrawn from navigation. By demonstrating that their vessels have been permanently removed from navigation, casino boat owners can rightfully maintain that there is only a theoretical possibility of their vessels sailing in the future.

As for the determination of whether or not a casino boat has been permanently withdrawn from navigation, this Court must set forth a standard that requires more than just a self-serving affidavit from a casino boat owner that they do not intend for the vessel to sail again. Owner intent does not have to be a purely subjective factor. The surrounding facts and circumstances will often clearly indicate the intent of the vessel owner. If, as some courts have found, a casino boat owner's intentions are relevant to the determination of permanently moored status, this Court must require objective manifestations of the owner's intent.

3. Is status as a worker caused by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) required to assert a Sieracki seaman claim for general maritime law damages?

On remand, the trial court dismissed Petitioner's claim against Caesars based on her alleged status as a Sieracki seaman. Petitioner appealed the decision. Declining to reconsider its prior opinion and finding no error in the dismissal of her Sieracki claim, the Court of Appeals affirmed. *See Conder v. RDI/Caesars Riverboat Casino, Inc.*, 918 N.E.2d 759 (Ind. App. 2009). On April 15, 2010, the Indiana Supreme Court denied Petitioner's motion to transfer jurisdiction. The Indiana Court of Appeals wrongly held that status as a longshoreman is a prerequisite for asserting a Sieracki claim. *See Conder v. RDI/Caesars Riverboat Casino, Inc.*, 918 N.E.2d 759,763 (Ind. App. 2009). In fact, the 1972 amendments to the Longshore and Harbor Workers' Act, actually preclude persons covered under the Act from making a Sieracki claim.

To accomplish that goal, Congress enacted 33 U.S.C. § 905(b),providing a person covered by the act with a negligence action against the vessel, expressly abrogating the "warranty" of seaworthiness. *See Aparicio v. Swan Lake*, 643 F.2d 1109, 1115 (5th Cir. 1981). Literally read, Section 905(b), which Congress enacted to abolish the Sieracki remedy, does not apply to maritime workers who are not within the coverage of the LHWCA. The statute manifests no intention to expand the abolition of the Sieracki-Ryan construct beyond the coverage of the LHWCA. *Aparicio v. Swan Lake*, 643 F.2d 1109, 1116 (5th Cir. 1981). *See also Pena*

v. Keystone Shipping Co., 142 F. Supp. 2d 801, 804-805 (S.D. Tex. 2001); *Blancq v. Hapag-Lloyd A.G.*, 986 F. Supp. 2d 376, 382 (E.D. La. 1997); *Eagle-Picher Industries, Inc. v. U.S.*, 937 F.2d 625, 632 (C.A.D.C. 1991).

In *Aparicio v. Swan Lake*, the Fifth Circuit refused to read into the 1972 amendments the abolition of judicially-built remedies as they apply to maritime workers not covered by the LHWCA, including those amphibious workers who may be covered only by a state compensation law or who may have no compensation law coverage at all. *See Aparicio v. Swan Lake*, 643 F.2d 1109, 1116 (5th Cir. 1981). *See also In re TPT Transp.*, 191 F. Supp. 2d 717, 720-721 (M.D. La. 2001) ("... section 905(a) does not abolish the Sieracki and Ryan remedies for certain workers who are not covered under the LHWCA."). In Aparicio, the Fifth Circuit reasoned that had Congress intended to affect the substantive rights of persons not covered by the LHWCA, it could readily have manifested that intention. *See Aparicio v. Swan Lake*, 643 F.2d 1109, 1116 (5th Cir. 1981).

Petitioner does not meet the status requirement and is not covered under the LHWCA. Assume for the sake of argument that Petitioner is not a Jones Act seaman. Therefore Petitioner, an employee injured at work on the M/V GLORY ROME, would not be covered by either the LHWCA or the Jones Act, but rather by state compensation law. The 1972 amendments to the Longshore Act did not abolish the Sieracki doctrine for a worker in such a position. *See Wilson v. Butler*, 2009 WL 111685, *4 (M.D. Fla.) ("For those workers who fall into the crack between seamen and longshore workers,

the Sieracki doctrine and the warranty of seaworthiness still rule the sea"); *Radut v. State St. Bank & Trust Co.*, 2004 WL 2480467, *3, n.36 (S.D.N.Y. 2004); *Cavin v. State, Fish and Wildlife Protection Div.*, 3 P.3d 323, 330 (Alaska 2000); *Blancq v. Hapag-Lloyd A.G.*, 986 F. Supp. 2d 376, 382 (E.D. La. 1997).

The Indiana Court of Appeals held that a Sieracki seaman claim requires the involvement of a navigating "vessel" and reiterated its previous holding that an indefinitely moored dockside casino with no transportation function or purpose does not qualify as a vessel in navigation. *See Conder v. RDI/Caesars Riverboat Casino, Inc.*, 918 N.E.2d 759,763 (Ind. App. 2009) *citing* 896 N.E.2d at 1179 (Emphasis added). However, the prior finding that the river boat was not a vessel because it had no transportation function or purpose is itself erroneous and works an injustice on Petitioner and all other casino boat workers in a similar position. The Indiana Court of Appeals' utilization of the "primary purpose" test is not consistent with *Stewart*. The *Stewart* court relied on 1 U.S.C. § 3 for the definition of a "vessel." *See Stewart*, 543 U.S. at 492, 125 S. Ct. at 1126. Section 3 requires only that a watercraft be "used, or capable of being used, as a means of transportation on water" to qualify as a vessel. It does not require that a watercraft be used primarily for that purpose. *Stewart*, 543 U.S. at 495, 125 S. Ct. at 1128. Clearly the Glory of Rome is a vessel pursuant to *Stewart*. There is a more than a practical possibility that the watercraft could be used as a means of transportation over water.

Petitioner has made an unseaworthiness claim as a Sieracki seaman against the vessel owners. This is

distinct from her Jones Act claim. An unseaworthiness claim under maritime common law is separate from a Jones Act negligence claim. *Vandekreeke v. USS Great Lakes Fleet, Inc.*,172 F. Supp. 2d 907, 911 (E.D. Mich. 2001). *See also Freeze v. Lost Isle Partners*, 116 Cal. Rptr. 2d 520, 523; 2002 A.M.C. 842 (Cal. App. 1 Dist. 2002) (Plaintiff's right to seek alternative relief for her damages under general maritime law was separate from the issue of whether she was a "seaman" under the Jones Act.).

Petitioner is a member of that particular class of maritime workers who "fall into the crack" between Jones Act seamen and longshore workers. If Petitioner is not covered under either the Jones Act or the Longshore Act, she is not precluded from making a claim, as a Sieracki seaman, for unseaworthiness against the vessel owner. Therefore, the Indiana Court of Appeal, as affirmed by the Indiana Supreme Court, incorrectly dismissed Petitioner's case.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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